DIVISION ONE
FILED: 04/10/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 11-0024
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	
MILOVAN RAJKO UROSEVIC,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2005-141996-001 DT

The Honorable Aimee L. Anderson, Judge
The Honorable Carolyn K. Passamonte, Judge *Pro Tempore*

REVERSED; REMANDED

Thomas Horne, Arizona Attorney General — Phoenix
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By Karen M.V. Noble, Deputy Public Defender
Attorneys for Appellant

T I M M E R, Judge

¶1 Milovan Rajko Urosevic appeals his conviction and resulting disposition for aggravated domestic violence, a Class

5 felony. He presents two issues on appeal, but one is dispositive: Did the trial court err by entering a judgment of conviction in light of the duplicitous nature of the charge against Urosevic? For reasons set forth below, we reverse and remand for a new trial.

BACKGROUND[1]

¶2 On December 2, 2005, Urosevic's wife, the victim, called 9-1-1 and told the operator her husband was "violent" and was trying to take off her clothes. He had pulled down her underwear and put his hands inside of her while accusing her of sleeping with another man. She was scared and had locked herself upstairs in a room with her three children.

¶3 When the Peoria Police arrived, Urosevic let them into the house. Urosevic initially told police that everything was fine but eventually admitted he had been fighting with his wife, whom he accused of cheating on him with "a guy [who] may have jumped out of the window." The officer noticed that Urosevic was sweating and barely making sense. When the officer asked if he was on any medication, Urosevic answered he was "[o]n methamphetamine."

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[1] We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against defendant. *State v. Vendever*, 211 Ariz. 206, 207, ¶¶ 1-2, n.2, 119 P.3d 473, 474 n.2 (App. 2005).

¶4 The officer spoke with the victim, who told the officer that Urosevic had "grabbed her from behind, . . . wrapped his arms around her, wrapped another arm around her abdomen and started feeling around inside of her shorts" for "semen or something in her vagina." She was "terrified" while Urosevic was holding onto her. She also told the officer her ten-year-old son had witnessed the altercation. When interviewed, the son stated he had seen "his mom and his dad downstairs arguing, and that dad pull[ed] mom's pants halfway down in the back." They were "yelling" and his mom was "trying to break free" until finally his father let her go.

¶5 The State charged Urosevic with one count of aggravated domestic violence for "commit[ing] Assault," and having two prior convictions for domestic violence offenses within sixty months of the present offense. A person can commit the crime of assault in three ways. Ariz. Rev. Stat. ("A.R.S.") § 13-1203(A)(1)-(3) (West 2012).[2] Prior to trial, defense

[2] Section 13-1203 provides, in relevant part, as follows:

> A. A person commits assault by:
>
> 1. Intentionally, knowingly or recklessly causing any physical injury to another person; or
>
> 2. Intentionally placing another person in reasonable apprehension of imminent physical injury; or

counsel asked the court to require the State to clarify which specific assault charge it would pursue and objected to preliminary jury instructions that instructed on all three types of assault. The court instructed the prosecutor to inform defense counsel which type of assault charge it would pursue. Later that day, the prosecutor told the court and defense counsel he was not required to specify which type of assault charge he would prove at trial, and he may pursue any one of the three types of charges depending on the evidence adduced at trial. The court accepted that statement, informing defense counsel she was on notice the prosecutor might pursue a conviction based on A.R.S. § 13-1203(A)(1), (2), or (3). At the end of the trial, over defense counsel's renewed objections, the trial court gave the jury a final instruction based on (A)(2) and (A)(3).

¶6 The jury found Urosevic guilty as charged. In a separate proceeding, the jury also found one aggravating factor: that the offense was committed in the presence of a child. Thereafter, the trial court suspended imposition of sentence and placed Urosevic on probation with terms. He timely appeals.

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3. Knowingly touching another person with the intent to injure, insult or provoke such person.

Absent material revision after the date of the alleged offense, we cite a statute's current version.

DISCUSSION

¶7 Urosevic argues we should reverse his conviction because both the indictment and charge against him were duplicitous, and the court erred by refusing to require the State to elect which charge it would pursue before the jury. The State asserts Urosevic waived these issues absent fundamental error because he failed to raise them to the trial court.

¶8 We agree with the State that Urosevic failed to object to the duplicitous nature of the *indictment*. He has therefore waived that issue absent fundamental error. *State v. Henderson,* 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). We do not discern any error, much less fundamental error. The indictment was not duplicitous because it did not charge distinct and separate offenses in a single count. *State v. Whitney*, 159 Ariz. 476, 480, 768 P.2d 638, 642 (1989). We do not address the parties' arguments concerning the indictment further.

¶9 We disagree with the State that Urosevic failed to adequately object to the duplicitous nature of the *charge*. "A duplicitous charge exists '[w]hen the text of an indictment refers only to one criminal act but multiple alleged criminal acts are introduced to prove the charge.'" *State v. Paredes-Solano*, 223 Ariz. 284, 287, ¶ 4, 222 P.3d 900, 903 (App. 2009) (quoting *State v. Klokic*, 219 Ariz. 241, 244, ¶ 12, 196 P.3d

844, 847 (App. 2008)). Urosevic sufficiently preserved this issue by asking the court before trial to require the State to elect which type of assault it would pursue, by objecting to the preliminary and final jury instructions for containing multiple theories for assault, and by raising the matter again in his Rule 20 motion. *See State v. Vanderlinden*, 111 Ariz. 378, 380, 530 P.2d 1107, 1109 (1975) (holding an objection is sufficient if it calls the trial court's attention to an error with sufficient clarity to establish the point and permit the trial court to address it). We review whether a criminal charge is impermissibly duplicitous de novo as an issue of law. *See State v. Ramsey*, 211 Ariz. 529, 532, ¶ 5, 124 P.3d 756, 759 (App. 2005).

¶10 In *State v. Sanders*, 205 Ariz. 208, 218-19, ¶ 44, 68 P.3d 434, 444-45 (App. 2003), we held that, unlike, for example, the theft statute, the state may not charge assault under multiple unspecified theories but must instead inform a defendant, in advance, which type of assault is being prosecuted. To pass muster under the Sixth Amendment, we concluded that, when charging assault or a greater crime that contains assault as a component, the state must provide more notice than simply stating, "assault;" it must also "allege facts and circumstances that will alert the accused specifically

to the type of assault he must prepare to defend against." *Id*. at 219, ¶ 48, 68 P.3d at 445.

¶11 Our supreme court more recently agreed with *Sanders*, deciding that the crimes of assault described under the various subsections of § 13-1203 are, in fact, distinctly separate crimes that require different evidence or elements. *State v. Freeney*, 223 Ariz. 110, 113, ¶ 16, 219 P.3d 1039, 1042 (2009). Thus, in that case, it found that a motion to amend the indictment alleging an (A)(2) violation to allege an (A)(1) violation was error because it changed the nature of the charged offense. *Id*. at ¶ 17.

¶12 Urosevic argues that because the court permitted the State to present evidence of two types of assault to prove a single count and failed to cure the defect through appropriate jury instructions, the court erred. *State v. Whitney*, 159 Ariz. 476, 480, 768 P.2d 638, 642 (1989). We agree.

> [I]f the State introduces evidence of multiple criminal acts to prove a single charge, the trial court is normally obliged to take one of two remedial measures to [e]nsure that the defendant receives a unanimous jury verdict. It must either require 'the [S]tate to elect the act which it alleges constitutes the crime, or instruct the jury that they must agree unanimously on a specific act that constitutes the crime before the defendant can be found guilty.'

Klokic, 219 Ariz. at 244, ¶ 14, 196 P.3d at 847. Because the court took neither measure, it erred by entering judgment on the verdict.

¶13 We next consider whether the trial court's error was harmless. *Freeney*, 223 Ariz. at 114, ¶ 26, 219 P.3d at 1043. "Error is harmless only if we can say, beyond a reasonable doubt, that it 'did not contribute to or affect the verdict.'" *State v. Green*, 200 Ariz. 496, 501, ¶ 21, 29 P.3d 271, 276 (2001) (quoting *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993)). Our inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict in *this* trial was surely unattributable to the error." *State v. Eastlack*, 180 Ariz. 243, 251, 883 P.2d 999, 1007 (1994) (internal quotation marks omitted) (citing *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)).

¶14 We cannot say beyond a reasonable doubt that the error did not affect the verdict. The State introduced evidence both that Urosevic placed the victim in reasonable apprehension of imminent physical injury (§ 13-1203(A)(2)) and that he knowingly touched her with the intent to injure, insult or provoke her (§ 13-1203(A)(3)). For example, in support of an (A)(2) violation, the jury heard the 9-1-1 tape, which recorded the victim saying Urosevic was becoming "violent," she was "afraid" of what would

happen, and she had locked herself and her children in a bedroom. An officer testified she was "terrified." In support of an (A)(3) violation, the jury heard evidence that Urosevic pulled down the victim's pants and groped her vagina in the presence of their son and because Urosevic was angered by the victim's perceived affair.

¶15 The prosecutor argued the applicability of (A)(2) and (A)(3) in closing arguments, and defense counsel countered with arguments on both provisions. Although the prosecutor emphasized an (A)(3) violation, he also told jurors it was for them to decide whether Urosevic intended for his wife to be "terrified" or to place her in fear of imminent physical injury. The court instructed the jury that the State proves the crime of assault by proving the existence of either (A)(2) or (A)(3). The court did not tell the jury it had to unanimously agree on the theory of assault, nor did it provide the jury with special verdicts. The jury returned a general verdict of guilty, which did not specify the theory of assault agreed upon by the jury.

¶16 Based on the foregoing evidence and events, we cannot conclude the court's error was harmless. A significant chance exists that some jurors found the State had proven assault under (A)(2) while the remainder found the State had proven assault under (A)(3), thereby depriving Urosevic of a unanimous verdict. We therefore reverse and remand for a new trial. In the new

trial, the State must either elect its theory of assault or the court must appropriately instruct the jury to ensure that any guilty verdict is unanimous. *Klokic*, 219 Ariz. at 244, ¶ 14, 196 P.3d at 847. In light of our holding, we do not address Urosevic's second contention of error, which asserts an issue that may not arise in a new trial.

CONCLUSION

¶17 For the foregoing reasons, we reverse Urosevic's conviction and resulting disposition and remand for a new trial.

/s/
Ann A. Scott Timmer, Judge

CONCURRING:

/s/
Maurice Portley, Presiding Judge

/s/
Andrew W. Gould, Judge